Office - Supreme Court, U.S.
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ALEXANDER L. STEVAS,
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Nos. 80-1832, 80-2170, 80-2171

# In the Supreme Court of the United States

OCTOBER TERM, 1981

IMMIGRATION AND NATURALIZATION SERVICE, APPELLANT

*v.*

JAGDISH RAI CHADHA, ET AL., APPELLEES

---

UNITED STATES HOUSE OF REPRESENTATIVES, PETITIONER

*v.*

IMMIGRATION AND NATURALIZATION SERVICE, ET AL., RESPONDENTS

---

UNITED STATES SENATE, PETITIONER

*v.*

IMMIGRATION AND NATURALIZATION SERVICE, ET AL., RESPONDENTS

---

*ON APPEAL FROM AND WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

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## UNITED STATES HOUSE OF REPRESENTATIVES REPLY BRIEF

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# CONTENTS


| | Page |
|---|---|
| Argument | 2 |
| 1. The Only Constitutional Question Is Whether Congress Can Review and Resolve Pleas of Deportable Aliens To Be Allowed To Reside Permanently In The United States | 2 |
| 2. The Congressional Review Provisions of Section 244(c)(2), Are Inseverable From The Integrated Whole of Section 244 | 9 |
| 3. Justiciability And Jurisdictional Hurdles Preclude Reaching The Constitutional Issues In This Case | 11 |
| 4. Section 244(c)(2) Is A "Necessary and Proper" Implementation of The Plenary Congressional Power Over Deportable Aliens | 14 |
| Conclusion | 17 |


AUTHORITIES


| | |
|---|---|
| Cases: | |
| *Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954) | 6 |
| *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288 (1936) | 2 |
| *Atkins* v. *United States*, 556 F. 2d 1028 (Ct. Cl. 1977) | 3, 4, 17 |
| *Baker* v. *Carr*, 369 U.S. 186 (1962) | 13 |
| *Bob Jones University* v. *Simon*, 416 U.S. 725 (1974) | 13 |
| *Buckley* v. *Valeo*, 424 U.S. 1 (1976) | 3, 19 |
| *Chaplin Refining Company* v. *Corporation Commission*, 286 U.S. 210 (1932) | 9 |
| *Cheng Fan Kwok* v. *INS*, 392 U.S. 206 (1968) | 14 |
| *Chrysler Corporation* v. *Brown*, 441 U.S. 281 (1979) | 9 |
| *Consumer Energy Council of America* v. *Federal Energy Regulatory Commission*, (D.C. Cir. Nos. 80-2184, 80-2312, Jan. 29, 1982) | 3 |
| *Fiallo* v. *Bell*, 430 U.S. 787 (1977) | 5 |
| *Gladstone Realtors* v. *Village of Bellwood*, 441 U.S. 91 (1976) | 12 |

Cases—Continued Page

*Hampton & Company* v. *United States*, 276 U.S. 394 ... 3
*Hill* v. *Wallace*, 259 U.S. 44 (1922) ... 10
*Jay* v. *Boyd*, 351 U.S. 345 (1956) ... 6
*Kilbourn* v. *Thompson*, 103 U.S. 168 (1881) ... 5
*Liverpool Steamship Co.* v. *Emigration Commissioners*, 113 U.S. 33 (1885) ... 2
*Mahler* v. *Eby*, 264 U.S. 22 (1924) ... 5
*McCulloch* v. *Maryland*, 4 Wheat (17 U.S.) 316 (1819) ... 15
*McGrath* v. *Kristensen*, 340 U.S. 162 (1950) ... 8
*Moore* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 47 (1971) ... 13
*Myers* v. *United States*, 272 U.S. 52 (1926) ... 15
*Princeton University* v. *Schmid*, No. 80-1576, per curiam (Jan. 13, 1982) ... 13
*Schlesinger* v. *Reservists Committee*, 418 U.S. 208 (1974) ... 12
*Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976) ... 11
*United States ex rel Hentopoulos* v. *Shaughnessy*, 353 U.S. 72 (1957) ... 6
*United States* v. *Lovett*, 328 U.S. 303 (1946) ... 13
*Valley Forge College* v. *American United*, No. 80-327, slip opinion (Jan. 12, 1982) ... 11

Legislative Material:

H. Rep. No. 647, 80th Cong., 1st Sess. 2 (1947) ... 10
H. Rep. No. 1365, 82d Cong., 2d Sess. 63 (1952) ... 10
S. Rep. No. 1204, 80th Cong., 2d Sess. 4 (1948) ... 10

Statutes:

*Immigration and Nationality Act of 1952*, Section 244 ... *passim*

Miscellaneous:

43 Op. Atty. Gen. No. 10 (Jan. 31, 1977) ... 16
Mansfield, *The Legislative Veto and the Deportation of Aliens*, 1 Pub. Ad. Rev. 281 (1941) ... 9

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**UNITED STATES HOUSE OF REPRESENTATIVES REPLY BRIEF**

The House of Representatives respectfully suggests that the Executive Department, speaking through the INS brief, misconceives (1) the statutory scheme respecting cancellations of deportation, (2) the constitutional considerations underlying congressional treatment of applications for discretionary cancellation of deportations, and (3) the justiciability and

prudential obstacles that attend resolution of the inter-Branch conflict.

## ARGUMENT

### 1. THE ONLY CONSTITUTIONAL QUESTION IS WHETHER CONGRESS CAN REVIEW AND RESOLVE PLEAS OF DEPORTABLE ALIENS TO BE ALLOWED TO RESIDE PERMANENTLY IN THE UNITED STATES

The House of Representatives protests the efforts being made to persuade this Court to violate two historic rules of constitutional adjudication: "one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Liverpool Steamship Co.* v. *Emigration Commissioners*, 113 U.S. 33, 39 (1885); see also *Ashwander* v. *T.V.A.*, 297 U.S. 288, 346–347 (1936) (Brandeis, J., concurring).

The only two parties in this deportation order review proceeding (Chadha and the INS), as well as the three supporting *amici* groups, cast their united opposition to the legislative review procedures of Section 244(c)(2) of the Immigration Act in broad "generic" lectures about the constitutional scope of congressional legislating power.[1] Their opposing briefs show little if any concern about the precise facts to which the pro-

[1] The *amicus* brief of the American Bar Association chides the House and Senate for seeking "to portray this case as involving a unique and distinctive statutory provision which, while falling within a general class called 'legislative veto', can only be assessed individually in light of its own peculiar history and purpose" p. 2). The ABA "position" is claimed to be that "the constitutional infirmities of Section 244(c) are neither created by, nor can be validated by, its own peculiar history and purpose, but rather arise from the *generic invalidity* of the legislative veto device" (p. 5) (emphasis added).

In other words, the ABA requests this Court to invalidate the "[h]undreds of legislative veto provisions [that] have been enacted, most within the last decade" (p. 2). Included within that multitude of provisions are, according to the ABA, at least seven variations of the veto device, such as the one-House veto, the two-Houses veto, one-and-a-half-House vetoes, and concurrent resolutions, Pp. 2–3.

posed "generic" constitutional rule is to be applied,[2] and no concern whatever about the consequences of making it constitutionally impossible for Congress to use the test of "common sense and the inherent necessities of the governmental coordination," *Hampton & Co.* v. *United States*, 276 U.S. 394, 406 (1928), in formulating ways for executing its own vested powers.

The Executive seems disposed to turn this into another "episode in a long tug of war between the Executive and Legislative Branches of the Federal Government respecting *the permissible extent of legislative involvement in rulemaking* under statutes which have already been enacted." *Buckley* v. *Valeo*, 424 U.S. 1, 140 n.176 (1976) (emphasis added). As if to underscore its position that legislative review of deportation-waiver pleas is "generically" identical with "legislative involvement in rulemaking," the Executive has submitted to this Court copies of the recent opinion of the District of Columbia Circuit in *Consumer Energy Council of America* v. *Federal Energy Regulatory Commission* (D.C. Cir. Nos. 80–2184, 80–2312, Jan. 29, 1982).[3] That decision invalidated a particular legislative review provision involving agency rulemaking. But the court took pains to note that its decision, which was described as "truly one of first impression" (slip opinion, p. 43), was premised on considerations significantly different from those involved in the Court of Claims ruling in *Atkins* v. *United States*, 556 F.2d 1028 (Ct. Cls. 1977), and in the Ninth Circuit ruling in the instant *Chadha* proceeding. Neither of

[2] The *amicus* brief of Certain Members of the House of Representatives claims that their interests in opposing the validity of Section 244(c)(2) "do not lie particularly in the direction of the suspension of Chadha's deportation, but in protecting the bicameral process required by Article I of the Constitution and in determining at what point the legislative process . . . ceases and at what point the faithful execution of the laws by the Executive begins." Brief, p. 3.

[3] The two Houses of Congress, like the Executive, appeared before the District of Columbia Circuit as *amici*. The House of Representatives has already authorized the Speaker to intervene in that case if necessary "to protect the interests of the House." See House petition for certiorari in the instant proceedings, No. 80-2170, pp. III–IV. The House intends to intervene below in order to have standing to petition this Court for review of the *Consumer* ruling.

Since Chadha's case obviously entails no "legislative involvement in rulemaking," what does it involve? What are the characteristics of the Section 244 procedures that the Executive would measure against the Presentment Clause requirements and the general separation of powers doctrine? What is it about the House disapproval of Chadha's plea for a waiver of his lawful deportation order that makes the President so anxious to exercise his own approval/disapproval powers under the Presentment Clause? What are the Executive concern and function with respect to treating Chadha's plea for a discretionary waiver that renders Congress impotent, under the separation of powers doctrine, from making a final resolution of the plea?

Answers to those questions are found only by first examining the unique and distinctive Section 244, which has its own peculiar purpose and history. The answers are not to be found, as the Executive would have it, by looking first at the "generic" deficiencies said to lurk in all "one-House veto" situations, including Section 244(c)(2), and then fitting the Section 244 (c)(2) procedure into the mold of those alleged constitutional deficiencies. What, then, are the fundamental characteristics of the Section 244 scheme?

1. Section 244 establishes the eligibility requirements and the procedural steps to be taken by deportable aliens who seek to be excused from their deportable status on grounds of hardship. Such pleas can be granted only on the authority of the Congress. It is the Congress, not the Executive, whose legislative power over the admission, exclusion and expulsion of aliens has been repeatedly recognized by this Court as sovereign and virtually unlimited in nature. See, e.g., *Fiallo* v. *Bell*, 430 U.S. 787, 792 (1977). And since Congress has such "sovereign power to expel aliens," *Mahler* v. *Eby*, 264 U.S. 22, 40 (1924), any legislative involvement in determining whether excludable aliens should be allowed to stay permanently in this country is constitutionally legitimate, subject only to the commands of procedural fairness and due process.

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the Court of Claims that a "one-House veto" of a salary recommendation is not an act requiring concurrence of both Houses in an "approach" rejected by this Court in *Kilbourn* v. *Thompson*, 103 U.S. 168, 182 (1881).

2. When a deportable alien, like Chadha, files an application for relief under Section 244, the alien is not seeking an adjudication of any legal or statutory rights. As Justice Jackson once observed, a deportable alien has no legal right "by virtue of constitution, statute or common law to have a lawful order of deportation suspended"—or cancelled. *Accardi* v. *Shaughnessy*, 347 U.S. 260, 269 (1954). The opinion of the Court in *Jay* v. *Boyd*, 351 U.S. 345, 355 (1956), is decisive on this point, and bears repetition: [6]

> Although such aliens have been given a right to a discretionary determination on an application for suspension [under Section 244], . . . a grant thereof is manifestly not a matter of right under any circumstances, but rather is in all cases a matter of grace. Like probation or suspension of criminal sentence, it "comes as an act of grace," *Escoe* v. *Zerbst*, 295 U.S. 490, 492, and "cannot be demanded as a right," *Berman* v. *United States*, 302 U.S. 211, 213. And this unfettered discretion of the Attorney General with respect to suspension of deportation is analogous to the Board of Parole's powers to release federal prisoners on parole.

And, added the Court (at 356), the Section 244(c) procedure, whereby the Attorney General must file with Congress a report as to all cases in which suspension is granted but does not file such a report where suspension is denied, "actually emphasizes the fact that suspension is not a matter of right." [7]

3. Since a Section 244 applicant has no legal right to a congressional "act of grace" in excusing him from the effects of a lawful deportation order, neither the Attorney General's discre-

[6] The INS brief (p. 41, n. 28) seeks to distinguish *Jay* v. *Boyd* on the ground that it involved a different category of deportable aliens, a category that is subject to the slightly different legislative review procedures of what is now Section 244(c)(3). But that is a distinction without a difference. The portion of the opinion quoted above deals with the general nature of an application for Section 244 relief, whatever category the applicant may fall into.

[7] See also *United States ex rel. Hintopoulos* v. *Shaughnessy*, 353 U.S. 72, 77 (1957): "[T]he statute does not contemplate that all aliens who meet the minimum legal services will be granted suspension. Suspension of deportation is a matter of discretion and of administrative grace, not mere eligibility. . . ."

tionary decision to deny a suspension request nor one House's discretionary disapproval of the request to cancel deportation can be what the Ninth Circuit described as "an enactment of positive law that alters individuals' substantive rights." J.S.App. 59a; 634 F.2d at 434. Chadha's status at all times has been, and remains, that of a lawfully deportable alien. That status did not change when the INS granted him a temporary stay of deportation. And the refusal of the Congress to permit a change in that status as "a matter of grace" cannot qualify as, in the Executive's words (INS brief, p. 42), "a change in the law as applied to a particular alien."

4. Contrariwise, Congress does permit the deportation proceedings to be cancelled and the alien's status altered when, in the words of Section 244(c)(2), "neither the Senate nor the Hous of Representatives shall pass such a resolution [stating in substance that it does not favor the suspension of such deportation]" within the specified period of time.[8] But that status change comes about only as "a matter of grace." The alteration in status results not from any change in "positive law" but simply from a discretionary dispensation of grace by the one body, the Congress, that has the sovereign power—a most awesome power—over the fate of deportable aliens.

5. The heart of the Section 244 scheme is its limited and conditioned delegation to the Attorney General of some—but not all—of this legislative power to provide relief to deportable aliens as "a matter of grace." In a real sense, to the Attorney General has been delegated the certiorari-like function of weeding out the ineligible applicants and those who "in his discretion" are deemed unworthy of relief; those applicants who survive the Attorney General's processes are awarded temporary stays of deportation, pending reports of their cases to the Congress and pending final resolution by Congress pursuant to

[8] The fact that deportation is cancelled after the Attorney General has reported the stay of deportation to Congress and neither House thereafter passes a resolution of disapproval does not mean takes no interest or action in the matter. All reports of stays granted by the Attorney General are carefully studied by congressional subcommittees dealing with immigration matters. If the committees conclude that the alien is entitled to an "extreme hardship" waiver, no resolution of disapproval is drafted or submitted to the respective Houses.

Section 244(c)(2). Specifically, the Attorney General has been delegated the following functions under Section 244:

(a) The function of receiving and considering in the first instance all applications or suspension of deportation under Section 244, filed by otherwise deportable aliens;

(b) The function of denying those applications that fail to meet the eligibility requirements of Section 244(a), or that are deemed "in his discretion" to be unworthy of relief; such denial orders are considered final for purposes of judicial review (*McGrath* v. *Kristensen*, 340 U.S. 162 (1950));

(c) "Upon application by an alien who is found by the Attorney General to meet the requirements of subsection (a) of this section the Attorney General may in his discretion suspend deportation of such alien" Section 244(c)(1), an order in the nature of a temporary stay or injunction that prevents the deportation order from becoming effective; [9]

(d) The function of reporting to the Congress all cases in which deportation has been suspended, including "a complete and detailed statement of the facts and pertinent provisions of law in the case . . . with the reasons for such suspension" (Section 244(c)(1));

(e) The function of deporting the alien, or authorizing the alien's voluntary departure, in the event that either House "passes a resolution stating in substance that it does not favor the suspension of such deportation" (Section 244(c)(2)); and

(f) The function of cancelling deportation (Section 244(c)(2)) and of recording the alien's lawful admission for permanent residence as the date of cancellation (Section 244(d)), in the event that neither House passes a disapproval resolution within the specified period.

It seems clear enough that none of the foregoing functions of the Attorney General represent execution of any exclusively executive power. Without Section 244, the Attorney General can do nothing by way of staying or cancelling a lawful deportation order. What he can do and does do is by way of delegated powers specified in Section 244, no more and no less. As

[9] Webster's Third New International Dictionary defines the first meaning of the word "suspend" as follows: "to debar or cause to withdraw temporarily from any privilege, office, or function."

this Court has so often observed, power delegated to some other officer or organ of government "must be rooted in a grant of such power by the Congress and *subject to limitations which that body imposes.*" *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 302 (1979) (emphasis added).[10]

Such, then, is the scheme of Section 244. It is a scheme for dispensing a unique form of Congressional pardon, an "act of grace" stemming from the plenary power of Congress over deportable aliens. And it is a scheme whereby Congress has mandated the Attorney General to gather the facts and to provide the meritorious and eligible applicants temporary relief from deportation, pending review and final decision by Congress. That is the scheme, in short, against which must be measured the constitutional objections of the Executive.

**2. THE CONGRESSIONAL REVIEW PROVISIONS OF SECTION 244(C)(2) ARE INSEVERABLE FROM THE INTEGRATED WHOLE OF SECTION 244**

Given the fact that the whole of Section 244 is a set of procedures designed to implement the power of Congress to dispense humanitarian waivers of deportation as "a matter of grace", to invalidate the core of that scheme—the congressional review procedures embodied in Section 244(c)(2)—is to leave "what is left" of Section 244 quite inoperative as a law. Cf. *Champlin Refining Co.* v. *Corporation Commission*, 286 U.S. 210, 234 (1932); *Buckley* v. *Valeo*, 424 U.S. 1, 108–109 (1976). What precedes Section 244(c)(2) are merely preliminary steps and procedures leading to congressional approval or disapproval of an "act of grace." And what follows Section 244(c)(2) are the consequences of congressional action taken pursuant to Section 244(c)(2). Putting together what precedes and what follows operate as a law.

[10] The initial use of the Section 244(c)(2) device of congressional review of deportation-waiver pleas appeared in the Alien Registration Act of 1940, 54 Stat. 670. It was perceived by contemporary commentators as "the device of a delegation of powers to the executive, subject to a contingent congressional veto on their use." Mansfield, *The Legislative Veto and the Deportation of Aliens*, 1 Pub.Ad.Rev. 281 (1941).

In an effort to breathe life into the preliminary procedures before the Attorney General, the INS and Chadha would have this Court upgrade the effect of the Attorney General's orders temporarily suspending deportation. Such orders would become final orders cancelling—not merely suspending—deportation proceedings. In effect, the Attorney General would become the final and unreviewable dispenser of the congressional power to waive lawful orders of deportation as matters of grace.

The Senate briefs have fully documented the consistent refusal of Congress to delegate or confer such final dispensing power on the Attorney General.[11] That being true the Executive is really asking this Court to rewrite the portions of Section 244 that precede Section 244(c)(2) in a manner contrary to the expressed will of Congress. Most certainly, "[t]his is legislative work beyond the power and function of the court." *Hill* v. *Wallace*, 259 U.S. 44, 70 (1922).

Even more difficulty is encountered in any effort to make operative, assuming the congressional dispensation feature of Section 244(c)(2) is stricken, the succeeding portions of Section 244. In a remarkable passage in the INS brief (p. 61, n. 39), the Executive would have this Court give vitality to the last sentence of Section 244(c)(2)—"If within the time above specified, neither the Senate nor the House of Representatives shall pass such a resolution, the Attorney General shall cancel deportation proceedings"—by a judicial fiat that "deportation proceedings would be cancelled when the period specified in Section 244(c)(2) expires." And new life would be injected into Section 244(d) by the simple expedient utilized by the Ninth Circuit, i.e., by judicial decree "the deportation proceedings are *deemed* cancelled within the meaning of Section 244(d)," 634 F.2d at 436, so that the Attorney General's "grant of suspension of deportation *automatically* leads to a grant of permanent resident status if the suspension is not lawfully

[11] See, e.g., S. Rep. No. 1204, 80th Cong., 2d Sess. 4 (1948); H. Rep. No. 647, 80th Cong., 1st Sess. 2 (1947). In those reports, the Judiciary Committees of the respective Houses rejected legislation proposed by the Executive to authorize the Attorney General to cancel deportations without congressional review. To the same effect, see H. Rep. No. 1365, 82d Cong., 2d Sess. 63 (1952).

disapproved by Congress," INS brief, p. 77. (Emphasis supplied).

In sum, the Executive and Chadha would reduce the role of Congress under the judicially revised Section 244 to (1) receiving reports from the Attorney General of his final orders cancelling deportation, and (2) retaining power during the "report and wait" period of enactioning "a law" requiring a particular alien's deportation "subject to whatever restraints may be imposed by the Bill of Attainder Clause." INS brief, p. 61, n. 39. All of this proposed rewriting serves to emphasize that, as the remainder of Section 244 is now written, the essential precondition for cancelling deportation and altering the alien's status is the meaningful acquiescence of both Houses in dispensing such relief, pursuant to the core congressional review procedures of Section 244(c)(2). The only basis for cancelling a deportation under Section 244 is by way of a congressional "act of grace" under Section 244(c)(2).

Thus Chadha cannot obtain the relief he seeks if the congressional role under Section 244(c)(2) is invalidated. The purpose of the whole of Section 244 is not to validate or invalidate an order of deportation; rather it is to establish a procedure permitting Congress to forgive compliance with that lawful order—"a matter of grace." Remove the Section 244(c)(2) source of grace and Chadha remains subject to the unforgiven but lawful order of deportation.

### 3. JUSTICIABILITY AND JURISDICTIONAL HURDLES PRECLUDE REACHING THE CONSTITUTIONAL ISSUES IN THIS CASE

Enough has been said about the inseverability of Section 244 (c)(2) to establish that Chadha simply lacks standing to challenge the constitutionality of that section. No court can give him the relief he seeks, the lifting of the lawful order of deportation. Only an "act of grace" by Congress under Section 244(c)(2) can give that relief. Thus he cannot show compliance with one of the ingredients of Article III standing, i.e., that his alleged injury "is likely to be redressed by a favorable decision." *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38 (1976); and see *Valley Forge College* v. *Americans United*, No. 80-327, slip opinion, p. 7 (Jan. 12, 1982).

Nor has Chadha met the other minimal requirements of Article III standing. The injury that he asserts, the threatened deportation, is not traceable to any "putatively illegal conduct of the defendant," *Gladstone Realtors* v. *Village of Bellwood*, 441 U.S. 91, 99 (1979), for the only defendant in this case is the INS. And the only threat emanating from the INS is a stout assertion that it will enforce the lawful order of deportation at least if this Court validates Section 244(c)(2). No, the only "injury" that Chadha has suffered in his challenge to Section 244(c)(2) is the refusal of the Congress to forgive his compliance with the deportation order.

But such a failure to receive a discretionary dispensation, as we have seen, cannot qualify as an injury to any legal statutory or constitutional right. Moreover, even if there were some kind of legal injury involved, the injury here is one "that results from the independent action of some third party not before the court," *Simon*, 426 U.S. at 42. Congress certainly was not a party defendant in the court below. Chadha thus comes perilously close to asserting no more than an "abstract injury in nonobservance of the Constitution," *Schlesinger* v. *Reservists Committee*, 418 U.S. 208, 223, n. 3 (1974), particularly since his Section 244(c)(2) is grounded solely on a separation of powers injury to the Executive.

Indeed, the non-personal and abstract nature of Chadha's constitutional challenge serves to highlight the undenied fact that were no adverse parties before the Ninth Circuit as to the sole matter in issue, the validity of Section 244(c)(2). The House does not assert, as the INS brief states (p. 73), that this was a "feigned" suit. But it does contend that on the constitutional issue and ensuing relief there was no adverseness as between the parties. And there was no adverseness because Chadha chose to base his contentions solely on the Executive constitutional controversy with the Congress.

It will not do to say that "the defense of the statute was undertaken by Congress itself." INS brief, p. 74. The House and Senate appeared before the Ninth Circuit only as *amici*, not as parties intervenor. And they appeared there not only to give their views on the validity of Section 244(c)(2) but to protest this obvious lack of adverseness between the two parties, relying

upon *Moore* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 47 (1971). And when the House and Senate intervened after the Ninth Circuit's judgment, they did so in large part to be able to pursue that protest to this Court.

There is no precedent for adjudicating a constitutional controversy between two Branches of Government where one of the Branches appears only as an *amicus*. *United States* v. *Lovett*, 328 U.S. 303 (1946), is not such a precedent; in that case the private parties plaintiff had a personal controversy with the United States, one Branch of which chose not to defend the validity of a congressional statute. *Lovett*, in other words, did not involve an inter-Branch controversy, with one Branch appearing only as *amicus*.

To permit the presence of an *amicus* to create the necessary adverseness between parties would create a far-reaching if not dangerous precedent. It would drain away significance from the Article III requirement that there be that "concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker* v. *Carr*, 369 U.S. 186, 204 (1962).

If the Court agrees that there was no adverseness between parties in the court below, there might be left a problem of whether that lack of adverseness can be cured in appellate proceedings in this Court. Here, of course, the House and Senate appear as parties intervenor, having intervened below after judgment. The House suggests that the Court has no appellate jurisdiction over a non-case or controversy in the lower court. To create a new controversy in this Court through intervention and realignment of adverse parties would seem possible only in the exercise of this Court's original jurisdiction. Compare *Bob Jones University* v. *Simon*, 416 U.S. 725, 740, n. 11 (1974); *Princeton University* v. *Schmid*, No. 80–1576, per curiam (Jan. 13, 1982).

A few final words are appropriate as to the Ninth Circuit's lack of jurisdiction under Section 106(a) to consider the constitutionality of Section 244(c)(2). The INS brief (p. 67) asserts that Chadha "manifestly does challenge the validity of the order requiring him to be deported from the United States."

The House respectfully disagrees. The validity of the deportation order in no way depended upon the action of the Congress or one House thereof under Section 244(c)(2).

To repeat, all that happened under Section 244(c)(2) was a refusal to grant a congressional pardon of Chadha's deportable status. That refusal occurred entirely outside the administrative proceedings before the INS, thus making applicable the rationale of *Cheng Fan Kwok* v. *INS*, 392 U.S. 206 (1968). What this Court was talking about in *Foti* v. *INS*, 375 U.S. 217 (1963), and what Congress had in mind in enacting Section 106(a), were situations where the INS *denies* an application for suspension of deportation. What we are dealing with here, however, is a case where the INS has *granted* an application, thus ending the administrative phase of Section 244; thereafter, in the independent review by Congress under Section 244(c)(2), Congress has refused to grant any discretionary relief from the lawful order of deportation.

Section 106(a) is not equipped to permit appellate review of congressional action under Section 244(c)(2), particularly since that action has no effect whatever on the propriety or validity of the deportation order.

### 4. SECTION 244(c)(2) IS A "NECESSARY AND PROPER" IMPLEMENTATION OF THE PLENARY CONGRESSIONAL POWER OVER DEPORTABLE ALIENS

The position of the House on the Constitutionality of Section 244(c)(2) has been fully set forth in its opening brief. Suffice it here to say that this section, like the other provisions of the Immigration and Nationality Act, represents an exercise by Congress of its affirmative Article I power to make all laws that it considers "necessary and proper" for carrying into execution its vast power over aliens. And, in exercise of the second or horizontal part of the Necessary and Proper Clause, Congress has delegated to the Attorney General certain limited quasi-legislative functions in aid of its Constitutional power to exempt certain aliens from deportation.

The INS brief has no meaningful discussion of this Constitutional footing of Section 244 (c)(2), while Chadha's brief

makes two limited references to the fact that the Necessary and Proper Clause has "built-in limitations," (pp. 24, 44). For the most part, the briefs concentrate on limitations on the Congressional authority "to make laws," limitations said to emanate from the separation of powers doctrine and from the Presentation Clause. In the analytical sense, the briefs approach legislation power from a negative point of view, in sharp contrast to the affirmative approach mandated by the Necessary and Proper Clause.

Justice Holmes once wrote that constitutional arguments in inter-Branch controversies drawn mainly from the executive power of the President or the President's duty to faithfully execute the laws "seem to me spider's webs inadequate to control the dominent facts." *Myers* v. *United States*, 272 U.S. 52, 177 (1926) (Holmes, J., Dissenting). The same kind of spider's webs seem to be woven into the INS and Chadha arguments concerning the limitations on legislative powers.

The glory of the Constitution, as Chief Justice Marshall put it, is that it is intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs." *McCulloch* v. *Maryland*, 4 Wheat. (17 U.S.) 316, 415 (1819). And to give content to the broad powers conferred on the legislature, and to permit it to adapt those powers to changing crises, the legislature must have "the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances." *Id.* 415–416. It is the Necessary and Proper Clause that gives the Congress that capacity. It permits the Congress to mold its legislation and to execute its vested powers in ever-changing and innovative ways. To deny the affirmative and creative force of this Clause, as the INS and Chadha have done, is to reduce it to no more than "a splendid bauble." *Id.* 421.

Of course Congress cannot reply on the Clause to enact laws prohibited by other parts of the Constitution. But even on that score, John Marshall warned that other words of limitation must "imperiously require" that an impediment be placed in the choice of means that this Clause gives to Congress. It is difficult indeed to spell from the Presentment Clause or the separation doctrine any imperious requirement that Congress

be forbidden to aid its execution of its power over aliens by means of the procedural techniques employed in Section 244 (c)(2).

On the contrary, the Necessary and Proper Clause is an affirmative source of power for adapting and innovating techniques of modern government. What provision in the Constitution imperiously forbids the Congress from finding new legislative ways to treat with the problem of illegal aliens? What provision in the Constitution imperiously outlaws legislative experiment in the "one-House veto" technique of governmental coordination and oversight?

Neither the INS nor Chadha can point to any such imperious proscriptions. Nor do they refute the strength of the statements in *Atkins* that the Necessary and Proper Clause "can authorize a given method of obtaining a desired result" 556 F.2d at 1061 and thus can authorize use of procedures short of bicameral legislation for exercising a legislative power or function, particularly since Article I, section 1 "does not automatically call for affirmative bicameral action every time a legislative power or function is being exercised or authorized, . . ." 556 F.2d at 1062.[12]

[12] This same thought was expressed by Attorney General Bell, 43 Op. Atty. Gen. No. 10 (Jan. 31, 1977), where he advised the President that the legislative disapproval provision Organization Act is constitutional. He there pointed out (p. 2) that "the statement in Article I, § 7, of the procedural steps to be followed in the enactment of legislation does not exclude other forms of action by Congress." The only response of the INS to Attorney General Bell's opinion is to repudiate it. Brief, p. 58, n. 37.

## CONCLUSION

For these reasons, supplementing those set forth in the opening brief of the House, the judgment of the Ninth Circuit should either be vacated or reversed. If the constitutional merits are reached, Section 244(c)(2) of the Immigration and Nationality Act of 1952 should be declared constitutional.

Respectfully submitted.

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February 12, 1982.

U.S. GOVERNMENT PRINTING OFFICE: 1982